Funding matters

Matthew Sharp asks: is it possible to get funding for tax disputes?

The familiar problem is this: a tax disputes adviser – solicitor or accountant – has a client with a strong case, but the cost of challenging HMRC is prohibitive to them. Faced with the prospect of unrecoverable professional fees, many advisers and clients have simply walked away from winnable and potentially precedent-setting matters. But is that really the best option?

Could we, as tax advisers, do more to explore alternative ways of funding disputes – especially ways that don't rely solely on the traditional private fee-paying model?

This article looks at the world of litigation funding in tax disputes and outlines some options advisers could consider. At the outset, a word of warning: litigation funding is a complex and technical area, and there are several regulatory bear traps. Any adviser stepping into this space should do so with caution and, where appropriate, take legal advice.

Legal and historical minefield

The complexity in litigation funding derives, in part, from the historical position. Until relatively recently, litigation funding was generally illegal in the UK. The common law doctrines of champerty (litigation support in exchange for a share of the proceeds) and maintenance (supporting litigation without an interest) were offences, based on the view that outside influence could actually or be perceived to corrupt justice by encouraging unmeritorious litigation.

Fortunately, attitudes have evolved. Modern litigation funding is now recognised as a tool to improve access to justice rather a means of subverting it, albeit that the doctrines of champerty and maintenance remain part of English law. Litigation funding is permitted, but only if it complies with a carefully circumscribed statutory framework that can feel like a dance through the proverbial minefield. This creates real risks for those unfamiliar with the rules and is why this is an area that requires legal advice.

No win, no fee – for tax?

Some tax advisers are willing to act on a contingency or 'no win, no fee' basis. This typically means charging fees only if the client is successful. While such arrangements are relatively common in civil litigation, their use in tax disputes is more restricted and raises a number of important legal questions.

For accountants

The position for accountants and tax advisers depends on whether the work involves litigation:

- **Permissible:** Accountants can enter into commercial contingency arrangements for advisory work where their fee is tied to a successful outcome – for example in the context

of R&D tax credit claims or SDLT refund claims. These matters do not involve litigation and are generally uncontroversial.

• **Not permissible:** Where an accountant is representing a client in the Tax Tribunal, the position changes. Even though the Tribunal allows non-lawyers to represent parties (with permission), contingency arrangements may be prohibited under the Courts and Legal Services Act 1990 and Legal Aid, Sentencing and Punishment of Offenders Act 2012. There is no clear case law on this point, but the risk of an unenforceable or illegal agreement poses a real risk to accountants.

Fortunately, accountants and other non-lawyer tax advisers can support litigation on a contingency basis, provided they are not themselves conducting the proceedings. In R (Factortame Ltd) v Secretary of State for Transport [2002] EWCA Civ 932, the Court of Appeal upheld an agreement under which Grant Thornton received 8% of the final settlement for their work supporting the litigation. The decisive factor being that Grant Thornton was supporting the litigation, not conducting it.

What, then, is the safest approach? Accountants would be well-advised to assume that contingency fee arrangements for representation in tax litigation are not generally permissible and, at least, not without risk.

For solicitors

Solicitors, by contrast, can (and indeed do) act on contingency arrangements in tax litigation, including Tribunal proceedings. The two primary options are:

• Conditional Fee Agreements (CFAs) — where some or all of the solicitor's fees are payable only on success, often with a success fee uplift.

• Damages-Based Agreements (DBAs) — where the solicitor takes a percentage of the client's recovery, instead of charging by the hour.

These arrangements are lawful and subject to detailed regulation. But they also raise other risks.

Risk of adverse costs

One major issue in litigation funding is the risk of third-party costs orders. Where a third party funds litigation and exercises control over it, they can in some circumstances be held liable for the other side's costs if the case fails. Funders – and advisers offering contingent arrangements – should be mindful of this risk.

Solicitors acting under CFAs, without control of proceedings, are generally safe from such orders. But where there's ambiguity, or control is shared, the risk could arise.

Importantly, pro bono arrangements are typically not caught by third-party costs orders. In R (Golding) v First-tier Tribunal [2012] EWHC 222 (Admin), the Court declined to make a costs order against a tax adviser acting without fee, warning that it would set a dangerous precedent discouraging advisers from acting pro bono.

Strategic or sector-supported funding

Some tax disputes raise legal issues with broader implications – beyond the interests of a single taxpayer. In such cases, third parties with a legitimate stake in the outcome may be willing to fund the litigation.

I once acted on a case where a private individual had a very strong legal claim, but could not afford the cost of a lengthy Tribunal battle. The legal point, however, was also of significant commercial interest to a corporate entity. That corporate entity agreed to fund the litigation, not for profit, but to ensure the issue was properly ventilated and its interest in the outcome protected.

These kinds of arrangements are lawful, provided they are carefully structured to avoid falling foul of champerty or maintenance rules. With appropriate advice, they can be ethical, commercially sensible and legally compliant.

In my own practice over the last several years, I have observed an increase in the tolerance for these once novel types of arrangements and actively look for opportunities like the one described above to support my clients.

Commercial litigation funders

In some cases, it may be possible to obtain funding from a professional third-party litigation funder. These funders often agree to pay the costs of the litigation in exchange for a share of the favourable financial outcome.

While more commonly used in group actions or commercial litigation, this model can be viable in tax disputes where:

- The taxpayer is a claimant (e.g. in overpayment relief claims, breach of warranty cases, or professional negligence claims), and
- The value of the claim and likelihood of success justifies the funder's investment.

For defence-side disputes (e.g. resisting HMRC assessments), funders will generally only get involved if there's a clear path to financial recovery for the taxpayer.

Group litigation/collective funding

In cases where multiple taxpayers face the same issue, pooling resources is often the best route forward. Whether the dispute arises from a common tax planning structure (for example, a failed tax avoidance scheme), HMRC guidance or a statutory interpretation affecting a whole sector, group funding arrangements can reduce individual cost exposure and amplify impact.

Such models are well-established in practice. Over the years I've helped co-ordinate and implement group litigation funding arrangements often where the individual claim values were modest but the collective benefit was significant. These kinds of matters are some of my favourite to work on, as taxpayers who would otherwise be denied access to quality representation get it and achieve better outcomes as a result.

Conclusion

In my view, funding constraints have forced taxpayers – and their advisers – to walk away from strong cases for too long. That needn't be the norm and there are now more alternative litigation funding solutions available to them than ever before.

The world of litigation funding is also no longer limited to commercial litigation. With proper understanding, careful structuring and regulatory awareness, funding models can and do work in tax disputes. Whether through solicitor contingency arrangements, commercial funders, sector support or group models, advisers now have more tools at their disposal than they may realise.

The key is to understand the boundaries, avoid the bear traps and minefields, and engage early on potential funding possibilities. Because when the legal issue matters – and when the taxpayer has a fighting chance – funding could make all the difference and grant them to access to justice.

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